APPENDIX A

State Statutes Directed Against Child Pornography and Leading Law Review Articles

New York Penal Law §263.15 (McKinney 1980), the statute in controversy, proscribed the distribution of materials which depicted children engaged in explicit sexual acts without insisting the material be obscene. Thirteen other states enacted like provisions: Ariz. Rev. Stat. Ann. §§13-3508, -3551 to -3555 (1978 & Supp. 1981); Col. Rev. Stat. §18-6-403 (Supp. 1980); Del. Code Ann. tit. 11 §§1103, 1108-1110 (1979); Haw. Rev. Stat. §§707-750 to -751 (Supp. 1980); Ky. Rev. Stat. §§531.300 to .370 (Supp. 1980); La. Rev. Stat. Ann. §14:81.1 (West Supp. 1981); Miss. Code Ann. §§97-5-31 to -37 (Supp. 1980); Mont. Rev. Codes Ann. §45-5-625 (1979); N.J. Stat. Ann. §2C:24-4 (West Supp. 1981); R.I. Gen. Laws §§11-9-1 to -3 (Supp. 1980); Tex. Penal Code Ann. tit. 9 §§43.23, .25 (Vernon Supp. 1980); W. Va. Code §§61-8C-1 to -3 (Supp. 1980); Wis. Stat. Ann. §940.203 (West Supp. 1980).

Four states except material in which nudity was presented for artistic, literary, scientific, educational or political purposes: Mass. Ann. Laws ch. 272, §§29A, 30D, 31 (Michie/Law Co-op 1980); Mich. Comp. Laws Ann. §750.145c (Supp. 1981); 18 Pa. Cons. Stat. Ann. §6312 (Purdon Supp. 1981); S.D. Comp. Laws Ann. §§22-22-22 to -25 (1979).

One state excepts material that reflects bonafide scientific or educational research or a bonafide object of art, which is not related to prurient interest: Okla. Stat. Ann. tit. 21 §§1021.1 to .3 (West Supp. 1980).

The Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. §§2251-2253 (Supp. III 1979), applies to distribution of child pornography only if the material is

legally "obscene." Additionally, eighteen states prohibit the distribution of child pornography only if legally obscene: Ala. Code §§13-7-203 to -238 (Supp. 1979); Ariz. Rev. Stat. Ann. §§13-3508, -3551 to -3555 (1978 & Supp. 1981); Ark. Stat. Ann. §§41-4201 to -4205 (Supp. 1981); Cal. Lab. Code §§1309.5 to .6; Cal. Penal Code §§311.2(b), 311.4 (West Supp. 1981); Conn. Gen. Stat. Ann. §§53a-196a to -196(b) (West Supp. 1981); Fla. Stat. Ann. §847.014 (West Supp. 1981); Ill. Ann. Stat. ch. 38, §11-20a (Smith-Hurd 1979); Ind. Code Ann. §§35-30-10.1-2 to -3, 35-42-4-4 (Burns 1979); Me. Rev. Stat. Ann. tit. 17, §§2921-2923 (Supp. 1980); Minn. Stat. Ann. §617.246 (West Supp. 1981); Neb. Rev. Stat. §§28-1463 to -1464 (1979); N.H. Rev. Stat. Ann. §§650:1-2 (Supp. 1979); Ohio Rev. Code Ann. §§2907.32.1, 2919.22 (Page Supp. 1981); Or. Rev. Stat. §§163.477 to .495 (1979); Tenn. Code Ann. §§39-1019, -1020, 50-707 to -717 (1977 & Supp. 1980); Tex. Penal Code Ann. tit. 9, §§43.23, .25 (Vernon Supp. 1980); Va. Code §§40.1-100(F), 18.2-374.1 (Supp. 1980); Wash. Rev. Code Ann. §§9.68A .010 to .900 (Supp. 1981).

All of the states whose laws prohibit the distribution of child pornography also prohibit its production. Eight states prohibit the production, but not the distribution, of child pornography even if it is not legally obscene: Alaska Stat. §11.41.455 (1980); Ga. Code Ann. §§54-309.1, 26-9943a (Supp. 1980); Iowa Code Ann. §728.12 (West 1979); Kan. Stat. Ann. §21-3516 (Supp. 1980); Mo. Ann. Stat. §568.060 (Vernon 1979); Nev. Rev. Stat. §§200.501, 5011(79) .509 (1980); N.M. Stat. Ann. §30-6-1 (Supp. 1980); Utah Code Ann. §§76-10-1206.5 (Supp. 1979).

Five states, finally, prohibit the production, but not the distribution of child pornography, if it is legally obscene: Md. Ann. Code art. 27 §419A (Supp. 1980); N.C. Gen. Stat.

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§14-190.6 (Supp. 1979); N.D. Cent. Code §§12.1-27.1-02, -03 (1976 & Supp. 1979); S.C. Code §§16-15-380, 16-15-440 (Supp. 1980); Wyo. Stat. §14-3-102 (1978).

The constitutionality of these various statutory approaches has been considered, with varying results, by a number of commentators. *Compare* Shouvlin, *Preventing the Sexual Exploitation of Children,* 17 Wake Forest L. Rev. 535, 559-560 (1981) (ban on distribution of child pornography constitutional even without obscenity requirement), and Note, *Protection of Children from Use in Pornography,* 12 J. L. Ref. 295, 312-18 (1979) (constitutional); *with* Note, *Child Pornography Legislation,* 17 J. Fam. L. 505 (1978-79) (unconstitutional) and Note, *Child Pornography: A New Role for the Obscenity Doctrine,* 1978 U. Ill. L. F. 711, 740-744 (unconstitutional). *See,* Baker, *Preying on Playgrounds: The Sexploitation of Children in Pornography and Prostitution,* 5 Pepperdine L. Rev. 809, 824-832 (1978) ("If the state can constitutionally protect a minor's welfare by restricting materials available to him or her, it follows that the state possesses authority to prohibit publication of sexually explicit materials which use minors as subjects." *Id.* at 831) None of these commentaries considers the impact of children's privacy rights on the First Amendment questions, nor the fact that photographing children engaged in sexual conduct is, unlike the photographing of adult sexual activity, illegal under federal law. *See* Emerson, *The Right of Privacy and Freedom of the Press,* 14 Harv. C.R.-C.L.L. Rev. 383 (1980); A.B.A. Nat'l Legal Resource Center for Child Advocacy and Protection, *Child Sexual Exploitation* (1981).

APPENDIX B

Effects of Sexual Exploitation of Children

The academic literature concerning the sexual abuse of children has recently burgeoned. Where "[p]sychiatrists in the past have erred in the direction of ascribing to childhood fantasy real cases of sexual assault upon children," Peters, *Children Who Are Victims of Sexual Assault,* 30 Am. J. Psychotherapy, 398, 420 (1976), the subject is no longer professionally taboo. The following is a representative sample of the recent books and articles bearing on the effects of sexual exploitation on the child victims.

I. Professional Studies

A. Burgess & L. Holmstrom, *Accessory-to-Sex: Pressure, Sex and Secrecy,* in Burgess *et al.,* Sexual Assault of Children and Adolescents 85, 94 (1978) (Effects of nonconsensual sexual relations noted include "changes in sleep patterns" and "early prostitution in mid-adolescence or before, early access to drugs or alcohol, poor school performance, decrease in physical health status, apathy or listlessness, and sexual disfunction. . . .").

Burgess & Holmstrom, *Sexual Trauma of Children and Adolescents,* 10 Nursing Clinic N. Am., 551 (1975).

DeFrancis, Vincent. *Protecting the Child Victim of Sex Crimes Committed by Adults* (Amer. Humane Assoc. 1969) (The seminal work in exposing the scope of sexual abuse and its consequences; emotional damage found to have occurred in two-thirds of child victims surveyed, severe emotional damage in 14% of the victims, *id.* at 169).

Ellerstein & Canavan, *Sexual Abuse of Boys,* 134 Am. J. Diseases of Children 255, 256-57 (1980) (". . . the sexual

abuse itself results in physical trauma to a large percentage of the boys.").

Finch *et al., Adult Seduction of the Child: Effects on the Child,* 7 Med. Aspects of Human Sexuality 170, 185 (1973) (". . . the vast majority of sexual seductions of youngsters cause some residual personality problems.").

D. Finkelhor, *Sexually Victimized Children* (1979) (experiences of sexual abuse "highly traumatic"; two-thirds of children told *no one* about the experience, *id.* at 66-67).

Fraser, *Child Pornography,* 95 New Statesmen 213 (1978) ("It is my firm impression . . . that the uproar and publicity that follows discovery of such incidents is frequently more emotionally damaging to the child than the experience itself. . ." *Id.* at 213).

Goldston, *Current Thinking on Sexual Abuse of Children,* 12 Med. Aspects of Human Sexuality 44 (1978).

Greenberg, *The Epidemology of Childhood Sexual Abuse,* 8 Pediatric Annals 289, 297 (1978) (sexual relations with adult parent "an overwhelmingly painful, traumatic experience" for children).

Groth, *Sexual Trauma in the Life Histories of Rapists and Child Molesters,* 4 Victimology 10 (1979) (higher incidence of sexual molestation in childhood history of sex offenders than in that of nonoffenders).

Herjanic & Wilbois, *Sexual Abuse of Children,* 239 J. Am. Med. A. 331, 333 (1978). ("Often the child is more disturbed by the reaction that the behavior [sexual abuse] brings forth than from the sexual activity itself.").

Jaffe, *Sexual Abuse of Children,* 129 Am. J. Diseases of Children 689, 691 (1975) ("Our data suggest that sexual

abuse has relatively low but significant physical morbidity.").

James, *et al., Physician Reporting of Sexual Abuse of Children,* 240 J. Am. Med. A. 1145, 1146 (1978) ("These results tend to support the view that the actual frequency of child sexual abuse far exceeds the reported cases.").

R. & H. Kempe, *Child Abuse* (1978) ("We believe *all* sexual exploitation is harmful." *Id.* at 56).

Lewis & Sarrell, *Some Psychological Aspects of Seduction, Incest, and Rape in Childhood,* 8 J. Am. Acad. Child Psych., 606, 618 (1969) ("Chronic anxiety . . . may be experienced when there are repeated experiences of an associated nature, all tending to interfere with the resolution of developmental tasks and each making the child more vulnerable. . . .").

Nelson, *Gonorrhea in Preschool and School-Aged Children,* 236 J. Am. Med. A. 1359, 1364 (1976) ("Gonorrhea is a rather common infection in prepubertal children. . . .").

Paulson, *Incest and Sexual Molestation Clinical and Legal Issues,* 7 J. Clinical Child Psych. 177, 180 (1978) ("Some national attention has focused on child (kiddy) pornography as one manifestation of sexual abuse of children. However, more concern seems to be expressed for the protection of the First Amendment rights of porno film producers than is expressed for the victim and his/her family." *Id.* at 177. "For many mothers, the humiliation forthcoming from the awareness of sexual abuse is intolerable . . . [with] dire consequences for the minor." *Id.* at 178).

Peters, *Children Who Are Victims of Sexual Assault and the Psychology of Offenders,* 30 Am. J. Psychotherapy

398, 419 (1976) (reaction of family and others to sexual assault as traumatic for child as the experience itself).

Schultz, *The Child Sex Victim: Social, Psychological and Legal Perspectives,* 52 Child Welfare 147, 150 (1973) ("By far the greatest potential damage to the child's personality is caused by society and the victim's parents . . .")

L. Schultz, *Kiddie Porn: A Social Policy Analysis* (U. W. Va. 1977).

Sgroi, *Pediatric Gonorrhea Beyond Infancy,* 8 Pediatric Annals 326, 327 (1979) (12.2 per 100,000 children aged 4 to 12 infected with gonorrhea).

Shamroy, *A Perspective on Childhood Sexual Abuse,* 25 Social Work 128, 131 (1980) (discusses the "psychosocial trauma that the child [sexual assault victim] experiences in testifying in front of numerous strangers").

Simrel, *et al., Crisis Management of Sexually Abused Children,* 8 Pediatric Annals 317 (1979) (". . . the psychological trauma that children may suffer as a consequence of sexual abuse is directly related to the reactions of parents, society, and personnel in the medical, legal, and social service agencies and institutions that deal with these situations." *Id.* at 317).

Summit & Kryso, *Sexual Abuse of Children: A Clinical Spectrum,* 48 Am. J. Orthopsychiatry 237, 239 (1978) ("The experience of the authors in the Los Angeles area indicates a much higher prevalence and much more significant mental health impact from sexual abuse than is commonly recognized.").

Tilelli, *et al., Sexual Abuse of Children,* 302 New Eng. J. Med. 319, 322 (1980). (seventeen percent of child vic-

tims of sexual offenses needed medical attention; also noted "a trend in these children toward persistent somatization, nightmares and phobias"). *See* Stechler, *Facing the Problem of the Sexually Abused Child,* 302 New Eng. J. Med. 348, 349 (1980). (criticizes the Tilelli article for its "absence of psychologic data" and deplores the "all too frequent omission from the health care system of consideration of psychological damage to sexually exploited children").

Tsai, *et al., Childhood Molestation: Variables Related to Differential Impacts on Psychosexual Functioning in Adult Women,* 88 J. Abnormal Psych. 417 (1979).

Weiss & Berg, *Child Victim of Sexual Assault: Impact of Court Procedures,* (Mimeographed) Presented at the annual meeting of the American Academy of Child Psychiatry, Chicago, 1980. ("Most children resist going to trial because of the embarrassment of having to relate in front of strangers the details of the sexual assault." *Id.* at 12.).

II. Legislative Inquiries

Sexual Exploitation of Children: Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary, 95th Cong., 1st Sess. (1977) [hereinafter *House Sexual Exploitation Hearings*].

Sexual Exploitation of Children: Hearings Before the Subcommittee on Select Education of the House Committee on Education and Labor, 95th Cong., 1st Sess. (1977).

Protection of Children Against Sexual Exploitation: Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 95th Cong., 1st Sess. (1977).

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Child Pornography: Its Related Causes and Control, Interim Report of Select Committee on Child Pornography, Texas House of Representatives (1978) [hereinafter *Child Pornography*].

Obscenity and the Use of Minors in Pornographic Material: Hearing before California Assembly Committee on Criminal Justice (San Diego, October 31, 1977) [hereinafter *Obscenity and the Use of Minors*].

Sexual Exploitation of Children: A Report to the Illinois General Assembly by the Ill. Legislative Investigating Commission (1980) [hereinafter *Sexual Exploitation of Children: A Report to the Illinois General Assembly*].

III. Popular Works

T. Able-Peterson, *Children of the Evening* (1981) (The author, herself a former prostitute, worked with sexually exploited children for several years in her capacity as counsellor in the Under 21 crisis shelter operated by Covenant House.).

R. Geiser, *Hidden Victims* (1979) (The author, Chief Psychologist at the Nazareth Child Care Center in Boston, concludes, "It would seem sensible to attack child pornography on the grounds that it is abuse rather than on the murky grounds of obscenity. Most health professionals would agree that child sexual exploitation is child abuse." *Id.* at 118.).

S. Janus, *The Death of Innocence* (1981).

C. Linedecker, *Children in Chains* (1981).

F. Rush, *The Best Kept Secret: Sexual Abuse of Children* (1980).

APPENDIX C

Consent of Children to Participation in Child Pornography

Whether a child can "consent" to his or her participation in the production of child pornography has not been extensively explored by the academic community. The most direct consideration of the question has been given by Dr. David Finkelhor, author of *Sexually Victimized Children* (1979):

> "Can children give informed consent to sex with adults? It is fairly evident that they cannot. For one thing, children lack the information that is necessary to make an 'informed' decision about the matter. They are ignorant about sex and sexual relationships. It is not only that they may be unfamiliar with the mechanics of sex and reproduction. More importantly, they are generally unaware of the social meanings of sexuality. For example, they are unlikely to be aware of the rules and regulations surrounding sexual intimacy, and what it is supposed to signify. They are probably uninformed and inexperienced about what criteria to use in judging the acceptability of a sexual partner. They probably do not know much about the 'natural history' of sexual relationships, what course they will will take. And, finally, they have little way of knowing how other people are likely to react to the experience they are about to undertake, what likely consequences it will have for them in the future."

Finkelhor, *What's Wrong With Sex Between Adults and Children*, 49 Am. J. Orthopsychiatry 692, 694-95 (1979). *See* Rosenfeld, *Treating Victims of Incest*, 8 Br. J. Sexual Med. 5, 10 (". . . a young child is incapable of giving an

informed consent [to sexual activity]."); Schwartzman, *The Individual, Incest and Exogamy*, 37 Psychiatry 171 (1974). *See* also, Rauh & Burket, *Adolescent Sexual Activity and Resulting Gynecological Problems*, 13 Med. Aspects of Human Sexuality 56, 57 (1979) (noting the often "serious complications . . . [and] tragic consequences of early adolescent sexual activity.")

Other scholars have independently corroborated the absence of children's "informed consent" in the actual functioning of the child pornography industry. *See*, Guio, Burgess & Kelly, *Child Victimization: Pornography and Prostitution*, 3 J. Crime & Just. 65, 68 (1980) (physical abuse and blackmail); L. Schultz, *Kiddie Porn: A Social Policy Analysis* 15-18 (U. W. Va. 1977).

The record of Congressional hearings leading to the enactment of the Protection of Children Against Sexual Exploitation Act of 1977 (18 U.S.C. §§ 2251-2253 (Supp. III 1979) is replete with testimony concerning the manipulation and coercion of the young to produce "kiddie porn". *See Sexual Exploitation of Children I, supra* note 12; *Sexual Exploitation of Children, Hearings Before the Subcommittee on Education and Labor*, 95th Cong., 1st Sess. (1977) (hereinafter *Sexual Exploitation of Children II*); *Protection of Children Against Sexual Exploitation, Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary*, 95th Cong., 1st Sess. (1977) (hereinafter *Protection of Children Against Sexual Exploitation*). *See especially, Sexual Exploitation of Children II, supra* at 42-43 (lease, then sale of 9-year-old boy by parents to older man for sexual molestation)(testimony of Lloyd H. Martin, L.A. Police Dept.); *Id.* at 66-68 (identifying child pornography actors as: (1)

"throwaways, . . . who are neglected and abused"; (2) the "children of parents involved in sexual industries" who are "as young as 6 years old"; and (3) the children of a "parent so [economically] desperate that he knowingly and willingly permits the child to be so abused") (statement of Joseph Freitas, Jr., San Francisco District Attorney); *Id.* at 112 ("I could continue to present case after case; a veritable litany of woes to support what has been claimed: That large numbers of American children are being coerced into performing sexual acts for pornographers.") (statement of Robin M. Lloyd, author of *For Money Or Love: Boy Prostitution in America*); *Id.* at 116 (kidnapping of 11-year-old boy in Texas for possible sale in Mexico to pornography producers) (testimony of Robin M. Lloyd); *Protection of Children Against Sexual Exploitation, supra* at 60 (camp in Michigan for "nice neighbor who the family trusted" to take child to be "tested" for use as pornographic model) (testimony of Michael Sneed, Chicago *Tribune* reporter).

Covenant House began its own work when Father Bruce Ritter gave shelter to a group of 10 children who had starred in a pornographic movie out of desperation for food and shelter. *Sexual Exploitation of Children II, supra* at 249-250.

APPENDIX D

Structure of Pornography Industry

Of interest in examining the nature of the child pornography industry is the following material, which is not by any means an exhaustive list:

The Report of the Commission on Obscenity and Pornography 7-25, 83-168 (1970). ("Most large exploitation producers act as their own distributors and also distribute films for smaller companies. . . ." *Id.* at 96.). So huge has been the revolution in the pornography industry during the last decade that the Commission's finding that "full male nudity is virtually unknown," *id.* at 11, now seems quaint, while its omission of *any* discussion of child pornography is disturbing. *See id.* at 100-101, 136-142 ("The use of pre-pubescent children in stag films is almost nonexistent." *Id.* at 139.).

Barrett, *Inside the Mob's Smut Rackets,* 103 Readers' Digest 128 (Nov. 1973).

Burgess, *et al., Child Sex Initiation Rings,* 51 Am. J. Orthopsychiatry 110 (1973).

Child Pornography, supra 9a (Appendix B, Part II).

Denison, *Smut: The Mafia's Newest Racket,* 99 Readers' Digest 157-160 (Dec. 1971).

Denison, *"Sultan of Smut."* 107 Readers' Digest 105 (Nov. 1975).

Guio, *et al., Child Victimization: Pornograph and Prostitution.* 3 J. Crime & Just. 65 (1980).

"Kiddie Porn" 60 Minutes. (Mimeographed) (transcript of CBS telecast of May 15, 1977).

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R. Lloyd, *For Money or Love: Boy Prostitution in America* (1977). The definitive popular description of sexual exploitation of young men.

Obscenity and the Use of Minors, supra 9a (Appendix B, Part II).

Protection of Children Against Sexual Exploitation, Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 95th Cong., 1st Sess. (1977) (hereinafter *Protection of Children Against Sexual Exploitation*). *See especially* pp. 48-57 (Bernard Carey), 57-64 (George Bliss & Michael Sneed).

C. See, *Blue Money* (1974). An anecdotal view of the pornography industry.

Sexual Exploitation of Children, Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary, 95th Cong., 1st Sess. (1977). *See especially* pp. 59-73 (Inv. Lloyd Martin, Los Angeles Police Dept.).

Sexual Exploitation of Children: A Report to the Illinois General Assembly, supra 9a (Appendix B, Part II).

Sneed, *et al.*, Series of investigative articles appearing in *Chicago Tribune* May 15-18, 1977, reprinted in *Protection of Children Against Sexual Exploitation, supra* 11a (Appendix C) at 130-150. The most significant of the journalistic analyses of the "kiddie porn" industry.

APPENDIX E

In the course of the 1977 Congressional hearings on sexual exploitation of the young, the following exchange occurred among Congressman Ashbrook, Herald P. Fahringer. Esq. and Mr. Larry Flynt:

MR. ASHBROOK. . . . I guess I would direct this question to you, Mr. Flynt, but I guess in general to Mr. Fahringer too. You both seem to come down on nudity and talk in those terms. But if we could shift a minute, *is it your contention that explicit sexual acts by children,* whether in film or in print, *are protected constitutionally, and therefore,* the film and publication and *distribution is* both *a constitutional problem?*

MR. FAHRINGER. *No; I don't urge that.* What troubles me more about the law is when you get into the area of the gray situations, simulated. I can easily see how a very artistic film could be made that would suggest in no uncertain terms a young girl like Jody Foster in Taxi Driver having intercourse with a man that was an integral part of the story. I would hate to see those films sanitized to the degree that there can be none of that, not even a suggestion of sexual conduct, which very often plays a dynamic part in these things.

MR. ASHBROOK. That is why I used the word *"explicit." It is your contention that explicit sexual acts by children could come under the area of some protection?*

MR. FAHRINGER. *Yes; you have no trouble with that.*

MR. FLYNT. Congressman, I see that a little differently. I am an absolutist when it comes to the Constitution. I don't feel there should be any obscenity laws; they should all be repealed. The American public should be able to do or read whatever they want, make their own decisions. *But when children come into it, that is where you have to*

draw the line, because you are violating someone's rights that cannot speak for themselves.

So my position only is what goes on between consenting adults. ***The minute a child is involved, regardless of the nature of the act, I don't think it even has to be obscene, as far as our definition of obscenity goes, that a violation of the law has taken place. . . .***

House Sexual Exploitation Hearings, supra 8a (Appendix B, Part II) at 270 (emphasis added).

APPENDIX F

The Statute in Question

For the convenience of the Court we set forth here the statute in question, New York Penal Law Section 263.15; with footnotes and bracketed material cross referencing other sections of the Penal Law which define its applicable terms:

§263.15 *Promoting a Sexual Performance by a Child*

A person is guilty of promoting[1] a sexual performance[2] by a child when, knowing the character and content thereof, he produces, directs or promotes any performance[3] which includes sexual conduct *actual or simulated*[4] [*sexual intercourse, deviate sexual intercourse,*[5] *sexual beastiality, masturbation, sado-masochistic abuse,*[6] or *lewd exhibition of*

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[1] "Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same. [§ 263.00(5)]

[2] "Sexual performance" means any performance or part thereof which includes sexual conduct [i.e., conduct described in bracketed material in text] by a child less than sixteen years of age. [§ 263.00(1)]

[3] "Performance" means any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience. [§ 263.00(4)]

[4] *"Simulated"* means the explicit depiction of any of the conduct set forth in subdivision three of this section which creates the appearance of such conduct *and* which exhibits any *uncovered portion of* the *breasts, genitals or buttocks.* [§ 263.00(6)]

[5] "Deviate sexual intercourse" means the conduct defined by subdivision two of section 130.00 of this chapter, [§ 263.00(7)] [as] "sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva". [§ 130.00(2)]

[6] "Sado-masochistic abuse" means the conduct defined in subdivision five of section 235.00 of this chapter, [§ 263.00(8)] [as] "flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed". [§ 235.20(5)]

the genitals (§263.00(3))] by a child less than sixteen years of age.

Promoting a sexual performance by a child is a class D felony. Added L. 1977, c. 910, §2. (Emphasis added.)

Certificate of Service

I hereby certify that on the 15th day of January, 1982, three (3) copies of the annexed motion for leave to file a brief *amicus curiae* and *amicus curiae* brief were mailed, postage prepaid, to:

(1) Robert M. Morgenthau, District Attorney,
New York County
Attorney for Petitioner
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I further certify that all parties required to be served have been served.

.....

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